Supreme Court, U.S.
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No. 95 172

In the

Supreme Court of the United States

July Term 1995

ANN W. POOLE, wife of, and
RAYMOND POOLE,

Petitioners

versus

LOUISIANA AND DELTA RAILROAD, INC.
THE CITY OF THIBODAUX, LOUISIANA, THE PARISH OF LAFOURCHE, AND THE STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether discovery of data found exclusively in the Federal Railroad Inventory Survey is prohibited by 23 U.S.C. 409 by virtue of the Supremacy Clause.

PARTIES TO THE PROCEEDING

The parties to these proceedings are:

Ann W. Poole
Raymond Poole
Louisiana and Delta Railroad, Inc.
The City of Thibodaux
The Parish of Lafourche
State of Louisiana, Department of Transportation and Development

This application for a writ of certiorari is filed on behalf of the Louisiana Department of Transportation and Development. Thus Rule 29.1 with respect to corporations is inapplicable.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Supreme Court of Louisiana denying the remedial writ is not reported. The decision of the First Circuit Court of Appeal of Louisiana denying the supervisory writ is not reported. The judgment of the 17th Judicial District Court for the Parish of Lafourche, State of Louisiana ordering the State to produce the documents is unreported.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Louisiana was rendered on April 21, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

PERTINENT STATUTES

23 U.S.C. §409 Discovery and admission as evidence of certain reports and surveys

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

23 U.S.C. §130 Railway-highway crossings

> (a) Except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway cross-

ing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State highway department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United

States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.— Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.— At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment.— Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums

apportioned under 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.— Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and transportation of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railway-highway crossings program.

(h) Use of funds for matching.— Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a

matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

STATEMENT OF THE CASE

This action arises out of a car/train collision occurring in Lafourche Parish, Louisiana on October 3, 1990 at the intersection of Audubon Avenue with the railroad tracks that run parallel to Acadia Road in Thibodaux, Louisiana. Both roads are parish roads and the safety devices at the intersection are maintained by the parish. Plaintiff admitted she failed to maintain a proper lookout as she negligently followed a car in front of her across the tracks. The train struck her from the right pushing her 213 feet.

The plaintiff, in the course of discovery, requested the Department of Transportation and Development (DOTD) to produce the rating index accident history, volume of vehicular traffic, volume of train traffic and any rules, regulations, guidelines, suggestions, or procedures, considered or promulgated for the purpose of eliminating or reducing grade crossing accidents at the intersection from January 1, 1980 to January 1, 1990. DOTD objected, claiming this information is compiled in the Federal Railroad Inventory Survey (survey) and protected from discovery under 23 U.S.C. §409. DOTD argued that the plain meaning of 23 U. S.C. §409 prohibits discovery of information included in the survey.

Under 23 U.S.C. §130, the State is required to identify and prioritize all railroad crossings for safety modification in order to receive federal funds for said modification. The State collects data, compiles it in the survey, reports to the Secretary of Transportation and allocates federal funds for safety enhancement projects once they are appropriated.

The purpose of prohibiting this discovery is to protect the State from liability while allowing it to candidly determine which crossings would best benefit from the expenditure of limited federal funds. Although the State has control over the appropriation of funds, it has no control over the actual up-

grade and continuing maintenance of crossings involving parish roads, as in this case. Therefore, allowing discovery of survey documents would potentially expose the State to liability for which it is not responsible.

Plaintiff moved to compel responses. The matter came on for hearing in the state district court on September 29, 1994. The trial judge ordered DOTD to produce all raw data pertaining to volume of vehicular traffic, volume of train traffic and accident history regarding the Audubon Avenue grade crossing from 1980 to 1990. Since the information only appears in the survey DOTD was ordered to extract it therefrom and place it in a separate document. In plain words, the State has been ordered to give over data compiled in the survey which is contrary to the plain meaning of 23 U.S.C. §409 and the weight of authority nationwide.

On February 24, 1995, DOTD applied for a writ to the First Circuit Court of Appeal of Louisiana which declined to exercise its supervisory jurisdiction. Subsequently, DOTD timely filed a writ application to the Supreme Court of Louisiana which was denied on April 21, 1995.

The State of Louisiana through the Department of Transportation and Development has complied with the Louisiana trial court order and is now before this Honorable Court on writ application to address the erroneous interpretation of federal law by the 17th Judicial District Court for the Parish of Lafourche, State of Louisiana.

REASONS FOR GRANTING THE PETITION

The decision of the 17th Judicial District Court of Louisiana below represents an erroneous interpretation of federal law 23 U. S.C. §409. This interpretation along with the latest ruling from Louisiana in *Wiedeman v. Dixie Electric Membership Corporation*, 627 So.2d 170 (La. 1993), cert. den., 114 S.Ct. 2134 (1994) significantly conflicts with most of the opinions of lower state and federal courts nationwide. It is imperative that this Honorable Court again review these interpretations and clarify the issues, not only to forestall an onslaught of civil litigation in state as well as federal tribunals but more importantly, to reach a result allowing the states to attain the greatest possible degree of safety at railroad crossings for their citizens.

A uniform application of 23 U.S.C. §409 is not only important to the states but is critical to railroads conducting operations in many jurisdictions who are now subject to differing interpretations of the statute depending on the forum. Addressing the conflicting views will not only settle this discovery issue on the national level but will allow the states ultimate candor in reviewing railroad crossings for safety modification. Ultimate candor will result in more accurate reporting, more accurate prioritizing of projects, more effective disbursement of federal funds and increased safety for all citizens of the United States.

The Highway Safety Act of 1973 is codified in 23 U.S.C. §101, *et seq.* and provides for the acceleration and the construction of federal aid highway systems recognizing that many of the existing highways are inadequate to meet the needs of local and interstate commerce. In connection with the implementation of the Act, and to secure federal funding for highway improvements, states have numerous responsibilities with respect to highway safety improvement programs including the identification, evaluation, planning, and imple-

mentation of projects in order to enhance the safety of potential accident sites within their respective jurisdictions.

32 U.S.C. §130 specifically addresses highways which intersect railroad crossings. It requires the states to maintain a survey of all highways which may need separation, relocation or protective devices. Because funds are limited, the states are required to establish a schedule of projects to be implemented as federal funds become available. These projects address safety enhancement of railroad crossings and are prioritized based on information in the survey such as volume of vehicular and train traffic, accident histories, reports, communications between DOTD and the state, engineering judgments, descriptions and statistics on each crossing.

In order to foster the free flow of safety related information between states and railroads and to encourage candor and accuracy in reporting the conditions of highways, Congress enacted Section 409 to prohibit a plaintiff from using documentation generated in compliance with Title 23 in civil trials. The latest ruling in Louisiana on discoverability under Section 409 is from the Supreme Court in *Wiedeman v. Dixie Electric Membership Corporation*. The *Wiedeman* court opined that the State has a substantial interest in broad discovery. *Id.* at 172. In general, parties may discover any relevant, non-privileged material which is either admissible or reasonably calculated to lead to admissible evidence. LSA C.C.P. Art. 1422. However, Section 409's explicit preemptive language overrides conflicting state law by virtue of the Supremacy Clause. U.S. Const. Art. VI, cl. 2; *Jones v. Roth Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed. 2d 604, 613 (1977). Therefore, Section 409 controls in matters of discovery. *Beecher v. Keel*, 607 So.2d 549 (La. 1992). See also *Clasphill v. Missouri Pacific Railroad Company*, 793 S.W. 2d 139, 140 (Mo. banc 1990). But Section 409 must be construed restrictively to prohibit only what is expressly proscribed therein. *Wiedeman* at 172.

Wiedeman further holds that reports, surveys, lists or data compiled pursuant to §130, 144 and 152 are not discoverable stating that the term "data compiled" suggests an end product as opposed to unedited factual material. Therefore, *Wiedeman* allows plaintiffs to discover source data such as accident reports, traffic counts and other raw data collected by the Department that is not yet compiled in an end product document and disallows discovery of:

(1) surveys to identify hazardous railroad crossings and improve them (§130);

(2) applications for federal assistance in replacing or rehabilitating highway bridges (§144);

(3) studies assigning priorities and schedules of projects for highway improvement (§152); and,

(4) other compilations made for developing highway safety construction projects which would utilize Federal-aid funds (§409).

Id. at 173.

What *Wiedeman* does not address is the question in this case: what if the only source of unedited factual material is a completed survey conducted pursuant to Section 130?

The Court in *Tardy v. Norfolk Southern Corporation*, 1995 WL 262303 (Ohio App. 4th Dist.) reads *Wiedeman* to say that raw data is discoverable only if gathered from sources other than reports, surveys, lists or data compiled pursuant to the federal aid program in Section 301. *Id.* at 3. The federal courts have taken the same position in *Robertson v. Union Pacific Railroad Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) and in *Lusby v. Union Pacific Railroad Co.*, 4 F. 3rd. 639, 641 (C.A. 8, 1993). Yet, in this case, the 17th Judicial District Court of Louisiana completely subverts Section 409, *Wiedeman*, *Lusby* and *Robertson* by requir-

ing DOTD to remove the data from the survey and put it in a separate folder if no other source of the information is available. The judgment requires DOTD to hand over information from an end product document which renders meaningless the privilege under Section 409, extended to surveys and data compiled pursuant to Section 130.

The weight of authority on the issue of discovery has been much more restrictive than *Wiedeman*. In *Robertson*, the United States Eighth Circuit Court of Appeal affirmed the exclusion of traffic counts, as well as a newspaper article addressing the dangerous nature of the railroad crossing at issue together with a formula used by the Arkansas Highway Department to evaluate railroad crossings in its state. The Court rejected plaintiff's contention that the data involved was beyond the protection of Section 409, simply because it might have been collected for other than Title 23 purposes. Speaking to the issue of the introduction of data, the Eighth Circuit stated:

> The railroad asserts that the district court properly excluded the newspaper article from evidence, because "[t]o allow the introduction of the data through the newspaper article would circumvent the purpose of the statute." We agree. Appellants are not entitled to introduce evidence of otherwise inadmissible data simply because it is reported by an indirect, secondary source. 954 F.2d at 1435.

Robertson further held that:

> The plain language of the statute excludes from evidence all data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding. Other courts have recognized that the underlying intent of the statute is to "facilitate candor in administrative evaluations of highway safety hazards," *Duncan v. Union Pacific R.R.*

> *Co.*, 790 P.2d 595 (Utah Ct. App. 1990), quoted in *Taylor v. St. Louis Southwestern Ry. Co.*, 746 F.Supp. 50, 54 (D. Kan. 1990), and to prohibit federally required record-keeping from being used as a "tool . . . in private litigation." *Light v. State*, 149 Misc. 2d 75, 560 N.Y.S. 2d 962, 965 (N.Y. Ct. Cl. 1990).

954 F.2d, at 1434

The Eighth Circuit in *Lusby* also disallowed expert testimony based on materials compiled for federal reporting purposes under Section 130 regardless of whether the materials were available for other purposes or from other sources. 4 F.3d at 641.

In accord with the Eighth Circuit is *Harrison v. Burlington Northern Railroad Company*, 965 F.2d 155 (7th Cir. 1992) in which the Court upheld the exclusion of a letter and a report from the Illinois Commerce Commission to Burlington, detailing the results of a report otherwise not discoverable. The Court also disallowed testimony of their authors quoting the trial judge in his assessment that allowing discovery would "duck the statute" (i.e. 23 U.S.C. §409). *Id.* at 159.

The Supreme Court of Mississippi in *Sawyer v. Illinois Central Gulf Railroad*, 606 So.2d 1069 (Ms. 1992), adopted a liberal interpretation more in accord with the Seventh and Eighth Circuits. It excluded a hazard rank inventory, a letter recommending improvements at a crossing and testimony concerning the same, noting that in *Bearden v. Southern Railway Co.*, No. CV88-PT-0005-S (N.D. Ala. July 11, 1988) (unpublished opinion), the plain language of Section 409 precluded discovery of <u>all</u> data related to railroad highway crossing to facilitate the free flow of safety-related information between the railroad industry and its regulatory bodies.

From Missouri is *Claspill v. Missouri Pacific Railroad Co.*, 793

S.W. 2d 139 (Mo. 1990) where the Court excluded a list of the most dangerous crossings in Missouri, a Field Inspection Form proposing safety enhancement and testimony explaining those exhibits. The court notes that "the plain language of Section 409 provides that certain information shall not be admitted into evidence."

In matters of discovery, the weight of authority does not distinguish between raw data and compilations representing end product documents as in *Wiedeman*. Nor does it distinguish between data compiled pursuant to Section 130 and data compiled from other sources.

A recent case from Arizona specifically addresses the issue of the protection of raw data versus compilations. In *Southern Pacific Transportation Company v. Yarnell*, 176 Az. 552, 863 P.2d 271(1994), the court held:

> The real parties in interest assert that "data" does not mean facts or raw data, but only means the written documents into which the data has been incorporated. That contention contradicts the plain language used by Congress. As the real parties in interest conceded at oral argument, "We're not reading the statute as it's written."
>
> Any other interpretation would render the statutory privilege illusory. Physical documents which contained data would be protected, but the data itself would not. Any other meaning would also undercut the statutory purpose. Congress apparently intended to protect the process of making rail crossing safety decisions from outside scrutiny and interference. [FN2] With countless miles of rail lines and highways throughout the United States but only finite resources, improving safety is necessarily an ongoing process. Not every safety measure can be adopted at every rail crossing with a snap of the fingers. Congress thought that decision seeking to opti-

mize the proper balance between safety and fiscal restraints would be best produced in a system free from intrusive second-guessing by civil torts actions, a system in which candid evaluations of highway safety hazards would flourish and information-gathering would be uninhibited. *Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (evaluations); *Perkins v. Ohio Dept. of Transp.*, 65 Ohio App. 3d 487, 584 N.E. 2d 794, 802 (1989) (information), *Sawyer v. Illinois Cent. Gulf R.R. Co.*, 606 So.2d 1069, 1074 (Ms. 1992) (information).

[2][3] The clear weight of authority holds that data as well as documents are protected by the statute. In *Robertson v. Union Pac.*, the court upheld the exclusion [FN3] of rail crossing safety data, of a newspaper article based on such data. The court held that introduction of data compiled for the purpose of highway and rail crossing safety enhancement was barred by "[t]he plain language of the statute." 954 F.2d at 1435. Moreover, the statute also bars secondary sources — such as the newspaper article — because "'[t]o allow the introduction of the data through the newspaper article would circumvent the purpose of the statute.'" *Id.* (quoting district court). In short, both the documents containing data and the data itself are protected. 863 P.2d, at 274.

Finally, in *Seaton v. Johnson*, No. 01-A-01-9408-CH-00322 (M.D. Tenn. App. Jan. 27, 1995), the plaintiff asked for daily freight train volume, daily passenger train volume, maximum timetable speed and accident history. The plaintiff argued on one hand, that Section 409 is very restrictive but allows the furnishing of this information. On the other hand, plaintiff argued that the information sought was the same as that which the state was required to collect and report to the federal government under Section 130. The Court denied discovery and explained as follows:

> It would be an anomaly for this Court to deny access to the State's copy of its report to the federal government only to require the State to compile from its records a report to plaintiff identical with that furnished to the federal government.
>
> The uncontradicted affidavit of the State's witness indicates that all of the "requested information" was collected and preserved for the sole and express purpose of complying with the federal statute of which 23 U.S.C. Section 409 is a part.

Seaton, No. 01-A-01-9408-CH-00322 at 5.

This case is clearly on point with the instant case in that all of the data requested herein is already compiled in a survey which is reported to the federal government. Said survey *in toto* is privileged under Section 409. If the entire survey is privileged, then its parts are also privileged and cannot be removed, placed in a separate folder and handed over to plaintiff. Such a result would lay open not only surveys but reports, schedules, lists and all data compiled pursuant to Section 130 to the ravages of personal injury plaintiffs. The privilege granted under Section 409 would be eradicated. Efforts at candor in communication and reporting would cease.

Railroad crossings are inherently dangerous. It is difficult and expensive to keep them as safe as possible. No amount of safety enhancement will protect the negligent plaintiff. But, ultimate candor should be encouraged to minimize the difficulty and expense of maintenance and maximize safety for the greatest number of citizens who hopefully will exercise common sense precautions. Without candor, the data compilations, reports, lists and surveys would become virtually meaningless as a tool to prioritize projects for safety enhancement.

As the weight of authority holds, all data related to the fed-

eral aid program established in Section 130, 144 and 152 should be privileged under Section 409. The plaintiff can easily hire an expert witness to evaluate a railroad crossing on site and from sources outside of the documentation compiled pursuant to these sections. Since accidents at railroad crossings are generally serious, plaintiffs will be quick to dispatch experts to determine ultra-hazardous conditions should they exist.

Short of that result, we respectfully request a ruling barring discovery of data already compiled in end product documents whose discovery is expressly proscribed by 23 U.S.C. §409 even if that is the only source of the information. Allowing piecemeal evisceration of surveys, reports, lists and data compiled is completely contrary to the plain meaning of the statute. It is contrary to the result in *Wiedeman, Lusby* and *Robertson, supra* that raw data must come from sources outside of end product documentation compiled pursuant to Section 130 and clearly contrary to the weight of authority on the issue.

CONCLUSION

We believe the issues here presented deserve consideration by this Court pursuant to Rule 10.1 (b), and (c). Section 409 of Title 23 remains the subject of confusion and inconsistent results. For the reasons as set forth herein it is respectfully requested and prayed that this Honorable Court review the decision of the 17th Judicial District Court of Louisiana.

When is it reasonable to assume that the process of evaluation and identification of hazardous sites will be protected under the mandate from Congress in Section 409? What, if anything, is discoverable under Section 409? Can you discover all data compiled in end product documents enumerated in Section 409 regardless of the source? Can you discover only certain data or none? Can you discover only raw data not yet compiled in a proscribed document?

Can you elicit expert testimony based on said data? If so, what data would be privileged? And, if so, would the expert be allowed to give opinion testimony based on the candid judgments and communications in the data? The rule is being interpreted haphazardly nationwide. Some uniformity is imperative for safety as well as commercial concerns.

Respectfully submitted,

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APPENDIX

A. Written opinion and judgment by the Honorable Jerome Barbera, III, 17th Judicial District Court, Parish of Lafourche, State of Louisiana.

B. Denial of Application for Writ of Certiorari by First Circuit Court of Appeal of Louisiana.

C. Denial of Application for Writ of Certiorari by the Supreme Court of Louisiana.

Appendix 2

ANN W. POOLE, WIFE OF, and RAYMOND POOLE	17TH JUDICIAL DISTRICT COURT
VERSUS 67,630 "B"	PARISH OF LAFOURCHE
LOUISIANA & DELTA RAILROAD, INC.	STATE OF LOUISIANA

JUDGMENT

This matter came on for hearing on September 29, 1994 on plaintiffs' motion to compel the State of Louisiana, through the Department of Transportation and Development, to produce certain documents and information.

PRESENT:

Kerry P. Camarata, Richard A. Thalheim, Jr., Ltd., 506 Canal Blvd., P. O. Box 5327, Thibodaux, Louisiana 70302. Attorney for plaintiffs.

Carey Rauhman Holliday, Assistant Attorney General, Louisiana Department of Justice, Litigation Division, P. O. Box 94095, Baton Rouge, Louisiana 70804-9095. Attorney for the State of Louisiana, through the Department of Transportation and Development.

Having read the memoranda and having heard the arguments of counsel, the Court is of the opinion that plaintiffs' motion should be granted in the following enumerated respects. Accordingly,

IT IS THE ORDER OF THE COURT that the State of Louisiana, through the Department of Transportation and Development provide plaintiffs' counsel, within fifteen days after the signing of this order, all raw data pertaining to volume of vehicular traffic, volume of train traffic and accident history

regarding the Audubon Avenue grade crossing from 1980 through 1990. The State need not produce the Federal Railroad Inventory Survey but, if the information ordered to be produced is contained only in that survey but, if the information ordered to be produced is contained only in that survey, the State will be required to put the information in a separate document;

IT IS FURTHER ORDERED that the State produce copies of all accident reports from 1980 through 1990 relating to the Audubon Avenue crossing, which reports are in the possession of the Department of Transportation and Development. DOTD will not be required to obtain copies of accident reports from the Department of Public Safety;

IT IS FURTHER ORDERED that the State make available for inspection and copying any written rules, regulations, procedures or manuals promulgated or followed by the State pertaining to grade crossing safety and elimination or reduction of train/vehicular collisions. Plaintiffs will bear the cost of reproduction of all portions of said material plaintiffs wish to retain.

THIBODAUX, LOUISIANA this 4th day of October, 1994.

/s/ Jerome Barbera, III

JUDGE

Appendix 4

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

ANN W. POOLE, WIFE OF, AND RAYMOND POOLE — NO. 94 CW 2296

VERSUS

LOUISIANA & DELTA RAILROAD, INC., ET AL

In re: State of Louisiana, Department of Transportation and Development, applying for supervisory writs, 17th Judicial District Court, Parish of Lafourche, No. 67630.

WRIT DENIED. We find no abuse of discretion. Weideman v. Dixie Elec., 627 So.2d 170 (La. 1993); certiorari denied, 114 S.C. 2134, 128 L. Ed. 2d 864 (1994).

JLW
KJF
TWT

COURT OF APPEAL, FIRST CIRCUIT

/s/ Karen West
DEPUTY CLERK OF COURT
FOR THE COURT

Appendix 5

THE SUPREME COURT OF THE STATE OF LOUISIANA

ANN W. POOLE, WIFE OF, AND
RAYMOND POOLE

VS. NO. 95-CC- 0603

LOUISIANA & DELTA RAILROAD,
INC., ET AL

IN RE: Transportation & Dev. Dept. of; Louisiana State of; Defendant(s); Applying for Supervisory and/or Remedial Writs; Parish of Lafourche 17th Judicial District Court Div."B" Number 67,630; to the Court of Appeal, First Circuit, Number CW94 2296

April 21, 1995

Denied.

CDK
PFC
WFM
JCW
BJJ
JPV

LEMMON, J. not on panel.

Supreme Court of Louisiana
April 21, 1995

/s/ John T. Olivier
Deputy Clerk of Court
For the Court